90-1529

Supreme Court, U.S.
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CASE NUMBER

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1990 TERM

RICHARD W. LUBART,

PETITIONER,

V.

COLLINS, COLLINS AND DINARDO, P.C.

APPEAL OF RICHARD W. LUBART

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

RICHARD W. LUBART
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QUESTIONS PRESENTED FOR REVIEW

I

Is the holding of this court announced in Hensley v. Eckerhart, 461 U.S. 424 (1983), that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate", Id. at 433, applicable to a fee determination made by a United States District Court, pursuant to the laws of the State of New York, apportioning a contingent fee between plaintiff's current and previous counsel in an action under the Federal Employers' Liability Act?

II

Is the holding of this court announced in Hensley v. Eckerhart, 461 U.S. 424 (1983), that the "product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of 'the results obtained' ", Id. at 434, applicable to a fee determination made by a United States District Court, pursuant to the laws of the State of New York, apportioning a contingent fee between plaintiff's current and previous counsel in an action under the Federal Employers' Liability Act?

III

Is the holding of this court announced in Hensley v. Eckerhart, 461 U.S. 424 (1983), that the fee applicant "should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims", Id. at 437, applicable to a fee determination made by a United States District Court, pursuant to the laws of the State of New York, apportioning a contingent fee between plaintiff's current and previous counsel in an action under the Federal Employers' Liability Act?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Thomas E. Lipani, plaintiff in the underlying Federal Employers' Liability Act action.

Amtrak, defendant in the underlying Federal Employers' Liability Act action.

Richard W. Lubart, plaintiff's attorney.

Collins, Collins and DiNardo, P.C., plaintiff's previous attorney and statutory lien holder pursuant to New York Judiciary Law § 475.

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THE OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York and the opinion of the United States Court of Appeals for the Second Circuit have not been reported.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The United States Court of Appeals for the Second Circuit has failed to follow the holdings of Hensley v. Eckerhart, 461 U.S. 424 (1983).

THE DATE OF THE JUDGMENT SOUGHT TO BE REVIEWED

The date of the order of the United States Court of Appeals for the Second Circuit is November 21, 1990.

THE DATE OF ANY ORDER RESPECTING A REHEARING

The date of the order respecting a rehearing sought to be reviewed is January 4, 1991.

THE STATUTORY PROVISION BELIEVED TO CONFER ON THIS COURT JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION BY WRIT OF CERTIORARI

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THE CASE

NEW YORK JUDICIARY LAW § 475

"The attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien."

STATEMENT OF THE CASE

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

On February 29, 1984 plaintiff, Thomas E. Lipani, was injured in an accident at defendant Amtrak's Penn Coach Yard in Philadelphia, Pa., involving defendant's locomotive 739.

Plaintiff retained Collins, Collins and DiNardo, P.C. ("CC & D" or "the Collins firm") during December 1984. "CC & D" filed a complaint on January 30, 1985. The case was dismissed by the court, subject to being reopened for good cause on April 7, 1987. Sometime after the case was dismissed Collins, Collins and DiNardo obtained a $50,000 offer from defendant.

Plaintiff discharged CC & D on November 18, 1989 and, has retained

Richard W. Lubart from that date to the present. The matter was settled in April, 1990 for $120,000.

On April 9, 1990, plaintiff filed a motion requesting that the lien held by the outgoing attorney, CC & D, by virtue of Jud. L. § 475, be discharged since the outgoing attorney had been discharged for cause.

An evidentiary hearing was heard on plaintiff's motion on May 16, 1990. At the hearing Collins, Collins and DiNardo brought their file on this case to the court but failed to introduce any records regarding the number of hours expended.

Collins, Collins and DiNardo also introduced evidence showing efforts, which were unsuccessful, to get plaintiff his job back at Amtrak.

After the evidentiary hearing held on May 16, 1990, The Honorable Thomas P. Griesa ruled from the bench that CC & D should receive half of the fee.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Federal jurisdiction in the United States District Court was pursuant to the Federal Employers' Liability Act.

ARGUMENT

I

Is the holding of this court announced in Hensley v. Eckerhart, 461 U.S. 424 (1983), that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate", Id. at 433, applicable to a fee determination made by a United States District Court, pursuant to the laws of the State of New York, apportioning a contingent fee between plaintiff's current and previous counsel in an action under the Federal Employers' Liability Act?

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Is the holding of this court announced in Hensley v. Eckerhart, 461 U.S. 424 (1983), that the fee applicant "should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims", Id. at 437, applicable to a fee determination made by a United States District Court, pursuant to the laws of the State of New York, apportioning a contingent fee between plaintiff's current and previous counsel in an action under the Federal Employers' Liability Act?

The above described holdings of this court have been reaffirmed on several occasions.

In the Civil Rights Attorney's Fee Act case of Blum v. Stenson, 465 U.S. 886 (1984) Justice Powell wrote:

"The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." Id. at 888.

In the Clean Air Act case of Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 106 S.Ct. 3088 (1986) Justice White wrote:

"We first addressed the question of the proper manner in which to determine a 'reasonable' attorney's fee in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983). We there adopted a hybrid approach that shared elements of both Johnson [v. Georgia

Highway Express 488 F.2d 714 (1974)] and the lodestar method of calculation. 'The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services.' 461 U.S. at 433, 103 S.Ct. at 1939." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 106 S.Ct. 3088, 3097 (1986)

In the Civil Rights case of Blanchard v. Bergeron, 109 S.Ct. 939 (1989) Justice White wrote:

"Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), directed lower courts to make an initial

estimate of reasonable attorney's fees by applying prevailing billing rates to the hours reasonably expended on successful claims." Blanchard v. Bergeron, 109 S.Ct. 939, 944 (1989).

In the Equal Access to Justice Act case of Commissioner, Immigration and Naturalization Service v. Jean, 110 S.Ct. 2316 (1990) this court, in an opinion by Justice Stevens, adopts for EAJA purposes, the Hensley standard of considering "the relationship between the amount of the fee awarded and the results obtained." Commissioner, Immigration and Naturalization Service v. Jean, 110 S.Ct. 2316, 2321 n. 10 (1990).

The argument in favor of demanding that the calculation of just compensation

begins with consideration of the hours spent was well stated by the Judge Moore in an private antitrust class action:

"The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts."

City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (CA2 1974).

Judge Wyzanski of the District of Massachusetts wrote in a shareholder's class action case:

"Yet unless time spent and skill displayed be used as a constant check on applications for fees there is a grave danger that the bar and bench will be brought into disrepute. . . ."
Cherner v. Transitron Electronic Corp., 221 F. Supp. 55, 61 (D. Mass. 1963).

Chief Justice Burger's concurring opinion in Hensley v. Eckerhart, supra gives further insight into the logic of requiring detailed records of the time and services for which fees are sought:
"I read the Court's opinion as requiring that when a lawyer seeks to have his adversary pay the fees of the prevailing party, the lawyer must provide detailed records of the time and services for which fees are sought. It would be inconceivable that the prevailing party should not be required to establish at

least as much to support a claim under 42 U.S.C. § 1988 as a lawyer would be required to show if his own client challenged the fees. A district court may not, in my view, authorize the payment of attorney's fees unless the attorney involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained.

A claim for legal services presented by the prevailing party to the losing party pursuant to § 1988 presents quite a different situation from a bill that a lawyer presents to his own client. In the lawyer case, the attorney and client have presumably built up a relationship of mutual trust and respect; the client has confidence that his lawyer has exercised the appropriate 'billing

judgment' . . . and unless challenged by the client, the billing does not need the kind of extensive documentation necessary for a payment under § 1988. That statute requires the losing party in a civil rights action to bear the costs of his adversary's attorney and there is, of course, no relationship of trust and confidence between the adverse parties. As a result, the party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fee to be allowed."

Hensley v. Eckerhart, 461 U.S. 424, 440-441, 103 S.Ct. 1933, 1943 (1983).

In this case the petitioner, Richard W. Lubart, has a contingent fee agreement

with plaintiff Thomas E. Lipani. Collins, Collins and DiNardo, plaintiff's previous counsel seeks to receive its share of petitioner's fee. Clearly no relationship of trust and confidence exists between petitioner and Collins, Collins and DiNardo. Therefore, it would be appropriate, applying Chief Justice Burger's reasoning, to require detailed records of the time and services for which fees are sought.

The judge in this case could not have given any consideration to the hours expended by Collins, Collins and DiNardo since no hours were documented or even estimated. He gave no consideration to the results obtained by Collins, Collins and DiNardo, a $50,000 settlement offer, versus the $120,000 settlement obtained

by Richard W. Lubart He failed to make any adjustment due to the failure of Collins, Collins and DiNardo to keep time records.

CONCLUSION

This court should grant this petition for a writ of certiorari to order the U.S. District Court for the Southern District of New York to reconsider this matter applying the holdings of Hensley v. Eckerhart.

Respectfully submitted,

RICHARD W. LUBART

APPENDIX

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THOMAS E. LIPANI, :

Plaintiff, :

v. : 85 Civ. 0836 (T.P.G.)

AMTRAK, :

Defendant. :

:

THE DECISION OF THE DISTRICT COURT

Just a minute. I don't think we're getting anywhere. We've got two lawyers who got involved in this. I'm going to make a ruling and we'll get it over with.

We need to bring this matter to a conclusion. This is a very unfortunate struggle over a fee. This is an action which brought by an injured railroad worker in early 1985.

The plaintiff, Thomas Lipani, had been represented by an attorney, whose name does not appear in the record, after his accident in 1984. But by the time of the suit he was represented by Collins, Collins, and DiNardo of Buffalo. That firm represented him until late 1989 at which time Mr. Lipani discharged Collins, Collins and DiNardo and retained Richard W. Lubart of Brookline, Massachusetts. Mr. Lubart arranged a settlement of his claim with defendant Amtrak for $120,000.

Mr. Lipani is obligated to pay about $1300 in expenses off the top of that $120,000 leaving approximately $118,700. The agreement with Mr. Lubart is to have a third of that represent the fee and for purposes of discussion I'll ignore

the $1300 deduction and say that we are dealing with one-third of $120,000 or approximately $40,000.

The present motion involves the question of whether the firm of Collins, Collins and DiNardo is entitled to any part of that fee of $40,000.

Mr. Lubart asserts that the Collins firm is entitled to nothing since that firm was discharged for cause and had performed in a woefully deficient manner.

The Collins firm claims that it is entitled to at least 50 percent of the $40,000 fee. The Collins firm asserts that there was no just cause for its being terminated and that it performed

its duties in a throughly professional and competent manner.

On the basic question of whether the Collins firm performed its professional obligations I find emphatically that it did. This does not mean that Mr. Lipani did not have the right to discharge the Collins firm. But the discharge of the Collins firm cannot justly be regarded as having been the result of deficiencies in performance on that firm's part.

The record abundantly shows the Collins firm investigated the case thoroughly and obtained sufficient discovery and evaluated the case realistically.

I know a good deal about the case through my own dealings with it over a

substantial period of time. What happened with the case, from the plaintiff's standpoint, was that the case had very substantial problems as far as liability and also as to damages and the Collins firm came to a judgment fairly early in the course of the litigation that was a very sound judgment; and that was that there should be every effort to have the plaintiff return to either his old job at Amtrak or to another job appropriate to his abilities .

I know from conferences with the attorneys of the earnest, sincere and active efforts on the part of both the Collins firm and counsel for the railroad to achieve this end.

Mr. Lipani is now in his late 40s. Obviously at the time of the accident he was somewhat younger and it was the judgment of the Collins firm and it was a sound judgment that there was a great advantage to plaintiff both economically and as far as his welfare as a human being in trying to see that he got back to work.

It is rare that I have seen attorneys in personal injury cases work as earnestly for such a desirable end over so considerable a period of time. Starting at least in 1986 and perhaps earlier, there were all kinds of attempts sponsored by the attorneys to have plaintiff qualify for a return to work either in his old job or in a substitute job.

Now, as far as the court was concerned, the case was placed on suspense at one point and then in the spring of '87 it was dismissed subject to being reopened. Beginning almost immediately after the dismissal of the cases or the conditional dismissal of the case, the Collins firm was in correspondence with the court apprising the court of the efforts to settle the case and of the efforts to have plaintiff return to his job.

Without going into detail, there was correspondence and there were conferences with the court reflecting the fluctuations in the relationships between the plaintiff and the railroad in the effort to settle the case.

At one time there was a request to have the case restored to the active docket and have a trial. Then there was a request to have the trial of the case adjourned in order to work on the settlement and this matter went back and forth in correspondence and in conference.

If this were a matter of being dilatory, of somehow attempting to create an appearance of activity where none was actually occurring, obviously that would be a very serious matter. But this was not the case here. I am absolutely confident, as I have indicated, that what was going on was a most serious and good faith effort to settle the case and have the plaintiff return to a very advantageous job.

An unfortunate circumstance arose as far as the court record was concerned because although the Collins firm had requested that the case be restored formally to the active docket, this was not done.

I very much regret such a circumstance. But this was in no way the fault of the Collins firm.

Twice the plaintiff himself visited the court and contrary to what he had been told by the Collins firm he found that the case had not been restored to the active docket. This was one of the principal reasons for a misunderstanding between plaintiff and the Collins firm leading to the termination of the Collins firm .

I say this with a desire to take full responsibility for the deficiencies of the court. On the other hand, I don't want to exaggerate this. The indication are that the plaintiff was advised of the basics of what was going on and the plaintiff was certainly vividly aware of the efforts to place him back on his job and he was participating in those efforts.

Certainly some confusion was engendered by the failure to have the court record in the best shape. But it is not a situation where plaintiff was really kept in the dark about what was happening.

The railroad made a $50,000 offer to settle at some point. The case was not settled for that. It was the position

of the railroad that if any substantial amount of the money was paid in settlement, all efforts to have the plaintiff return to his job would cease and the plaintiff would have to resign.

The Collins firm consistently took the position that if there was to be a settlement with the resignation of plaintiff, the settlement would have to be in the $400,000 area.

As I say, the plaintiff became dissatisfied with the Collins firm in late 1989, discharged the Collins firm and brought in Richard W. Lubart from Brookline, Massachusetts.

The quality of Mr. Lubart's work is not really before the court. One factor, however, which is relevant is although

Mr. Lubart was offered access to the file of the Collins firm and was offered the opportunity to review the entire file in Buffalo, Mr. Lubart never took advantage of that opportunity.

Therefore Mr. Lubart really did not know what the Collins firm had done or not done. Mr. Lubart really did not know if there was anything in the Collins firm's file which would be an advantage to him in dealing with the case.

Mr. Lubart accumulated various materials, and apparently extensive materials, from his client and from other sources but he never found out what was in the Collins firm's file.

This has a bearing on the present application of Lubart to deny the

Collins firm any fee. He never saw the file of the Collins firm until approximately 6:30 P.M. today in the last stages of this motion.

He has made extensive comment about the failure of the Collins firm to obtain production of certain maintenance records of the locomotive in question. This was an entirely frivolous accusation.

Document discovery was requested on a timely basis by the Collins firm and those requests related to whatever maintenance records existed. None were produced because none existed even at the time of a very early and timely request.

Now, Mr. Lubart managed to settle the case for $120,000. And the plaintiff has resigned and will never return to work for Amtrak. The plaintiff has no job.

I'm not in any sense criticizing the $120,000 settlement. But it is clear that Mr. Lubart was willing to compromise further than the Collins firm was willing to compromise, both in respect of the amount of the settlement and in respect to the prospects of plaintiff's employment by Amtrak.

Perhaps that compromise was all to the good. In any event, it has been made.

But under no circumstances does the settlement indicate that the work of the

Collins firm was fruitless or incompetent.

The Collins firm has made a substantial contribution to the ultimate outcome of the litigation and deserves to be compensated.

Mr. Lubart has made a substantial contribution to the outcome of the litigation and deserves to be compensated.

It is my ruling that the fee of approximately $40,000, and it's a little less than $40,000 is to be split 50-50 between Mr. Lubart and the Collins firm.

This may be somewhat less than the Collins firm deserves. But I do not feel able to justly and fairly refine

the relevant positions of the two sets of lawyers in such a way as to arrive at some different adjustment.

There was a suggestion by the Collins firm that they might be entitled to as much as 90 percent of the fee. I think that would be quite unfair to Mr. Lubart and in any event, all that can be done here is to make a rough estimation. The 50 - 50 split is what I've arrived at.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of November, one thousand nine hundred ninety.

PRESENT: HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE JOHN M. WALKER, JR.,
CIRCUIT JUDGES.
HONORABLE RAYMOND J. DEARIE,
DISTRICT JUDGE.

THOMAS E. LIPANI, :

Plaintiff-Appellant, :

v. : 90-7610

AMTRAK, :

Defendant-Appellee. :

Appeal from the United States district Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel for both sides.

UPON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be and it hereby is AFFIRMED.

1. Richard Lubart, Esq. appeals from a decision of the Hon. Thomas F. Griesa denying his motion to discharge the outgoing attorney's lien of the firm Collins, Collins & DiNardo P.C., and ordering him to pay fifty percent of the net fee in the underlying case to the Collins firm.

2. In 1984, plaintiff Thomas E. Lipani was injured during the course of his employment with defendant Amtrak. He thereafter retained the Collins firm on a contingent fee basis to represent him in his Federal Employer's Liability Act suit against Amtrak. After five years of intermittent litigation and attempts to settle plaintiff's claim, which included attempts to return plaintiff to a job at Amtrak, the Collins firm was discharged on November 19, 1989, and on

January 9, 1990, plaintiff retained Mr. Lubart on a contingent fee basis. In April, 1990, plaintiff's case was settled for $120,000 and a waiver of his employment rights with Amtrak. Believing that he was not obligated to pay any portion of his fee to the Collins firm, Mr. Lubart made his motion to discharge the Collins firm's lien.

3. Mr. Lubart argues that the Collins firm's attorney's lien, under N.Y. Jud. L. sec. 475, was terminated when the case was dismissed on April 7, 1987. However, the case, which had been on the suspense docket, was dismissed subject to being reopened for good cause, pursuant Judge Griesa's administrative procedures. Thereafter, the Collins firm continued its efforts to settle the case. When settlement prospects seemed

dim, the Collins firm on several occasions requested that the case be returned to the active docket and a trial date set. Inadvertently, however, the case was not formally restored to the active docket before the Collins firm was discharged. Under these circumstances, it is clear that the Collins firm continued to vigorously represent the plaintiff up until the time of their discharge, as Judge Griesa so found, and therefore the conditional dismissal in April, 1987 does not effect their lien.

4. Mr. Lubart next contends that the Collins firm was discharged for cause, for failure to prosecute diligently the action, and thereby was not entitled to any compensation. See Poltronieri v. Talasco, 204 N.Y.S. 613, 615 (2d Dep't

1960), aff'd, 215 N.Y.S. 2d 509 (1961); Artim v. Artim, 486 N.Y.S. 2d 328, 328-29 (2d Dep't 1985); Lai Ling Cheng v. Modansky Leasing Co.,541 N.Y.S. 2d 742, 744 (Ct. App. 1989). After conducting a hearing involving testimony by the plaintiff and defendant's attorney and argument by Joseph DiNardo of the Collins firm and Mr. Lubart, and reviewing the Collins firm's case file, Judge Griesa found that the firm had performed its professional obligations. The court noted that the Collins firm investigated the case throughly, obtained sufficient discovery, realistically evaluated the plaintiff's claim and determined that establishing liability and damages in court might be difficult, and came to the sound conclusion that a strong effort should be made to have the plaintiff return

either to his old job or to another position at Amtrak. The court found that the Collins firm worked diligently to settle the case and to have the plaintiff return to a job. The court noted that although the plaintiff became dissatisfied with the Collins firm, the discharge cannot be regarded as having been the result of deficiencies on the part of the Collins firm. This finding was consistent with the plaintiff's testimony at the hearing. We see no basis for disturbing the court's finding that the Collins firm was not discharged for cause and was therefore entitled to compensation for the reasonable value of its services.

5. Finally, Mr. Lubart challenges the court's allocation of fifty percent of the net fee to the Collins firm. Judge

Griesa found that both the Collins firm and Mr. Lubart had made "substantial contributions" to the ultimate outcome of the litigation, and decided that a 50-50 split was appropriate, noting that the evidence of their relative contributions was not sufficiently clear to justify a more precise allocation. This determination was proper. When successive counsel are involved in a dispute over fee allocation, the outgoing attorneys may elect a contingent percentage fee based on the proportionate share of the work performed on the whole case, which can be determined at the conclusion of the case based on the amount of the recovery and the relative contributions of the lawyers to the case. Lai Ling Cheng, 541 N.Y.S. 2d at 744-45. Lubart's claim that detailed, contemporaneous time

records were required to support the Collins firm's claim for compensation, based on New York State Ass'n for Retarded Children v. Carey, 711 F. 2d 1136, 1147-48 (2d Cir. 1983), is unavailing, as the Carey decision addresses the court-ordered award of attorney's fees to a pervailing party, and does not address the proportionate allocation of a contingent fee between successive counsel for one party.

6. Although we dismiss each of each of Mr. Lubart's challenges to the district court's decision his arguments, both to the district court and to this court, are non-frivolous, and we believe, not imposed for an improper purpose. Accordingly, the Collins firm's request to this court for sanctions (misstated as under Rule 11, Fed. R. Civ. P.,

instead of Rule 38, Fed. R. App. P.) is denied. Moreover, we doubt that the imposition of Rule 11 sanctions in the district court would be appropriate.

7. The decision of the district court is affirmed.

/s/ Ellsworth A Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND

/s/ John M. Walker, Jr.
JOHN M. WALKER, JR.

/s/ Raymond J. Dearie
RAYMOND J. DEARIE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the city of New York, on the 4th day of January, one thousand nine hundred and ninety-one.

THOMAS E. LIPANI,	:	
Plaintiff-Appellant,	:	
v.	:	90-7610
AMTRAK,	:	
Defendant,	:	

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant Thomas E. Lipani.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
CLERK